FOSTERING NEURODIVERSITY & PROTECTING INDIVIDUALS WITH NEURODEVELOPMENTAL DISORDERS IN THE WORKPLACE

INTRODUCTION

Currently, 15-20% of the total population is considered "neurodiverse," meaning their brain function and behavioral traits deviate from what is typical.[1] Furthermore, the United States is seeing "sustainable and alarming increases" in the prevalence of autism spectrum disorder (ASD) and attention-deficit/hyperactivity disorder (ADHD) with cases doubling or even tripling in one generation.[2] ASD and ADHD are the two most common medical diagnoses associated with neurodiversity.[3] ASD and ADHD are classified as neurodevelopmental disorders (NDDs) in the DSM-5, the latest authoritative reference for health care experts who diagnose and manage these disorders.[4] Consequently, in coming years, American employers will inevitably face an unprecedented level of neurodiversity in their applicant pool and ultimately, workplace. It is foreseeable that this will potentially result in more cases of employment discrimination under Title I of the ADA.

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[1] Jessica Lee & Matthew Leger, *Embracing Neurodiversity at Work* 6 (Am. Enter. Inst., Working Article No. 2024-04, 2024), https://www.aei.org/wp-content/uploads/2024/04/Embracing-Neurodiversity-at-Work-Unleashing-Americas-Largest-Untapped-Talent-Pool.pdf

[2] Renee J Dufault, et al., *Higher Rates of Autism and Attention Deficit/Hyperactivity Disorder in American Children: Are Food Quality Issues Impacting Epigenetic Inheritance?* WORLD J. CLIN PEDIATR. 12(2): 25–37 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10075020/

[3] Cleveland Clinic, *What Does It Mean When A Person Is Neurodivergent?,* CLEVELANDCLINIC.COM, (Jun. 02, 2022), https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent

[4] Deborah J. Morris-Rosendaul & Marc-Antoine Crocq, *Neurodevelopmental Disorders—The History And Future Of A Diagnostic Concept*, DIALOGUES CLIN NEUROSCI. (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7365295/

Several companies have already begun to recruit and welcome neurodivergent talent which has proven to be a competitive advantage.[5] Research suggests that teams with neurodivergent professionals can be 30% more productive than those without them.[6] The increased productivity may be attributed to the several strengths associated with neurodivergent conditions that are addressed later in this Article. Nonetheless, it is clear that not all employers are interested in fostering neurodiversity in the workplace.

Despite considerable progress on the scientific and awareness front, the employment prospects of individuals with NDDs remains bleak. According to a recent study, 85% of *college-educated* individuals with ASD remain unemployed.[7] Similarly, 30% of individuals with ADHD face chronic unemployment issues and are 61% more likely to be fired from a job compared to individuals without ADHD.[8] Research has concluded that the occupational burden associated with ADHD is substantial.[9] This should be of grave concern to disability advocates because the disproportionate struggle in maintaining a health-based lifestyle in the face of psychological distress and social maladjustment of ADHD contributes to a 13-year reduction in life expectancy for those with the disorder.[10] The failure to assist and integrate individuals with ADHD into society

[5] Robert D Austin, et al., *Neurodiversity as a Competitive Advantage*, HBR.ORG, (2017), https://hbr.org/2017/05/neurodiversity-as-a-competitive-advantage
[6] *Id*.
[7] Nicole Lyn Pesce*, Most College Grads with Autism Can't Find Jobs. This Group Is Fixing That*., MARKETWATCH.COM (Apr. 2, 2019), https://www.marketwatch.com/story/most-college-grads-with-autism-cant-find-jobs-this-group-is-fixing-that-2017-04-10-5881421
[8] American Deficit Disorder Association, *Impact of ADHD at Work*, (Jul. 24, 2023), https://add.org/impact-of-adhd-at-work.
[9] Andreas Jangmo, et al., *Attention-deficit/hyperactivity disorder and occupational outcomes: The role of educational attainment, comorbid developmental disorders, and intellectual disability*, PLOS ONE 16(3): e0247724, (Mar. 17, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7968636/
[10] Janice Rodden, *ADHD May Reduce Life Expectancy by As Much As 13 Years*, ADDITUDEMAG.COM (Mar. 31, 2022), https://www.additudemag.com/adhd-life-expectancy-russell

is undeniably taxing on their overall health. Helping integrate individuals with NDDs into the workplace can allow millions of individuals to have healthier, longer lives.

This Article recognizes that lawyers will play a vital role in fostering neurodiversity in the workplace and protecting people with NDDs as they transition into the labor market. This Article further recognizes that the Americans with Disabilities Act is the primary mechanism that lawyers will rely on to facilitate this transition and secure protection for people with NDDs. Therefore, there is a need for lawyers, law students, disability advocates, and employers to understand the unique attributes of these disorders as well as the various challenges that arise in NDD-related workplace discrimination claims. By identifying these issues steps can be taken to assure a brighter future for people with NDDs.

This Article will be developed in three sections. Section I, Part A, explains the background, general framework, and key terms of Title I of the ADA. Part B explains what NDDs are and describes some of their unique traits which contribute to why courts continue to grapple with their compatibility under the ADA. In Section II, Part A, it is revealed that proving an "actual disability" remains a major hurdle for plaintiffs with ADHD even after the Amendments were enacted to provide broad coverage to people with disabilities. Part A argues the way courts analyze whether ADHD "substantially limits" a major life activity or bodily function is wholly inconsistent with the purpose and text of the ADAAA. Part B explains why plaintiffs with NDDs also struggle to prove that they are "qualified" to perform the essential functions of their job primarily due to their social impairments. Lastly, Section III concludes by summarizing the primary findings and proposed solutions presented in this Article.

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barkley/#:~:text=Patients%20whose%20ADHD%20persisted%20into,similar%20age%20and%20heath%20profile.

I. OVERVIEW OF THE ADA AND NEURODIVERSITY

During the civil rights movement in the 1960s, disability advocates identified an opportunity to fight alongside other minority groups to demand equal treatment, equal access, and equal opportunity for people with disabilities.[11] By the early 1970s, disability rights activists successfully persuaded Congress to pass the Rehabilitation Act of 1973, the first piece of legislation to protect the civil rights of people with disabilities.[12] The Rehabilitation Act of 1973 (Section 503) provided equal opportunity for employment within the federal government and in federally funded programs, prohibiting discrimination on the basis of either mental or physical disability.[13] However, by the 1980s disability activists began to lobby for even more protection for people with disabilities and demanded a broader and more comprehensive statute that included private employers.[14]

After decades of campaigning and lobbying, the Americans with Disabilities Act of 1990 (ADA) was passed.[15] Congress enacted the ADA in response to congressional findings that people with disabilities were precluded from fully participating in society and were subject to pervasive discrimination.[16] By enacting the ADA, Congress sought to exercise the full sweep of their authority to address discrimination against individuals with disabilities in everyday activities.[17] The ADA is comprised of five sections, called "titles," each of which provide requirements that

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[11] STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, DISABILITY LAW CASES AND MATERIALS 3 (2d ed. 2017).
[12] *Id*.
[13] *Id*.
[14] *Id.* at 4.
[15] *Id*.
[16] Pub. L. No. 101-336, §2(a), (codified at 42 U.S.C. §12101(a) (1990)). (emphasis added).
[17] *Id.* at §4(b)

different kinds of organizations must abide by.[18] This Article focuses on Title I which sets out the requirements for employers.[19]

Like the Rehabilitation Act of 1973, under the ADA of 1990, the legislative efforts made by Congress to protect people with disabilities fell short. Following the enactment, the Supreme Court of the United States eroded the scope of ADA protection by narrowly interpreting the legal definition of "disability."[20] Due to the narrow interpretation of "disability," only people with the most severe disabilities were considered eligible for ADA protection.[21] Dissatisfied with this outcome, Congress amended the ADA in 2008 (ADAAA).[22] While the ADAAA did not change the definition of "disability," it provided several rules of construction to guide judicial interpretation.[23]

Importantly, Title I of the ADA[24] is enforced by the Equal Employment Opportunity Commission (EEOC). The EEOC is authorized to investigate charges of discrimination against employers as well as issue legislative regulations.[25] Courts are instructed to defer to the regulations to guide their interpretation of the ADA.[26]

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[18] ADA National Network, *An Overview of the Americans with Disabilities Act*, ADATA.ORG (2017), https://adata.org/factsheet/ADA-overview
[19] *Id.*
[20] STEPHEN F. BEFORT, *supra* note 10 at 19.
[21] *Id*. (the narrow interpretation set such a high threshold that even a man diagnosed with mental retardation was not considered disabled).
[22] *Id*. at 51.
[23] *Id*.
[24] For simplicity, this Article will refer to the Rehabilitation Act of 1973, ADA of 1990, and ADAAA, as the "ADA" unless otherwise distinguished. That is because they embody the same general framework and terminology.
[25] EEOC, *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, (May 5, 2016), EEOC.GOV, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other resource#:~:text=Deference%20by%20Courts%3A,long%20as%20they%20are%20reasonable.
[26] *Id*.

A. Framework and Key Terms of the ADA

The general anti-discrimination provision of the Americans with Disabilities Act provides that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment.[27] The language of this rule makes establishing eligibility for protection under the ADA slightly more complicated than other laws that prohibit employment discrimination.[28] The complexity derives from the fact that there are generally two threshold requirements: first, a plaintiff-employee must satisfy the Act's specific definition of "disability," and second, demonstrate that they are a "qualified individual."[29] These determinations involve a case-by-case inquiry depending on the specific circumstances and situation.[30]

1. Actual Disability: Substantial Limitation to a Major Life Activity

The ADA defines an "actual disability" as a physical or mental impairment that "substantially limits" one or more "major life activities."[31] The ADA does not supply a concrete definition as to what constitutes a "substantial limitation," but instead defers to the EEOC which interprets a

[27] 42 U.S.C. § 12112(a) (LexisNexis 2009)
[28] *Technical Assistance Manual for Title I of the ADA*, Jan.org (Oct. 29, 2002), https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm
[29] *Id*.
[30] *Id*.
[31] 42 U.S.C. § 12102(1)(A) (LexisNexis 2009) (this Article addresses the actual disability prong, but a person can be included within the definition of disability in two additional ways); § 12102(1)(B) (defines "disability" as a record of such an impairment); § 12102(1)(C) (defines "disability" as being regarded as having such an impairment).

substantial limitation to mean an individual who is unable to perform a major life activity compared to an average person in the general population.[32]

While the original ADA also did not define "major life activities,"[33] it now provides a non-exhaustive list including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[34] Major life activities also include "major bodily functions" such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[35]

Lastly, following the Amendments, the ADA prohibits consideration of ameliorative effects of mitigating measures[36] such as medication[37] when assessing whether an impairment substantially limits a major life activity.

2. "Qualified" to Perform "Essential Functions"

Under the ADA, a "qualified individual" is a person who can perform the "essential functions" of the job that they hold or desire, with or without reasonable accommodations.[38] When determining if something is an "essential function," consideration is given to the employer's

[32] 29 C.F.R. § 1630.2(j)
[33] STEPHEN F. BEFORT, *supra* note 10 at 52.
[34] 42 U.S.C. § 12102(2)(A) (LexisNexis 2009).
[35] 42 U.S.C. § 12102(2)(B) (LexisNexis 2009).
[36] *Id*. at § (4)(E)(i) (LexisNexis 2009).
[37] 42 U.S.C. § 12102(4)(E)(i)(I) (LexisNexis 2009).
[38] 42 U.S.C. § 12111(8) (LexisNexis 2009).

judgment and an employer's written job description is referred to as evidence.[39] The term "essential functions" does not include the marginal functions of the position.[40]

3. "Reasonable Accommodation" Unless "Undue Hardship"

Lastly, unlike other federal anti-discrimination statutes, like the Civil Rights Act of 1964, which prohibits any consideration of personal characteristics such as race or national origin, when a person's disability creates a barrier to employment opportunities, the ADA imposes an affirmative duty on employers to consider if "reasonable accommodation" could remove the barrier.[41]

A "reasonable accommodation" is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process.[42] Failing to provide reasonable accommodations to known physical or mental limitations of an otherwise qualified individual with a disability constitutes discrimination unless the employer can demonstrate that the accommodation would impose an "undue hardship" on the operation of the business.[43] An "undue hardship" is one that causes significant difficulty or expense incurred by the employer.[44]

B. Neurodevelopmental Disorders & The Neurodiversity Movement

In addition to familiarizing oneself with the general terms and framework of the ADA, it is also important to understand the general nature of neurodevelopmental and behavioral disorders

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[39] *Id.*
[40] 29 C.F.R. § 1630.2
[41] Office of Disability Employment Policy, *Accommodations*, U.S. DEP'T OF LABOR (Nov. 20, 2023), https://www.dol.gov/agencies/odep/program-areas/employers/accommodations#:~:text=Under%20Title%20I%20of%20the,done%20during%20the%20hiring%20process.
[42] 29 C.F.R. § 1630.2(o)(1) (LexisNexis).
[43] 42 U.S.C. § 12112(5)(5)(A) (LexisNexis 2009).
[44] 42 U.S.C. § 12111(10)(A) (LexisNexis 2009).

(NDDs) prior to analyzing NDD-related workplace discrimination claims. The nature of NDDs is unique, ambiguous, and at times, paradoxical. These attributes undoubtedly influence their compatibility with employment as well as with the ADA.

1. The Paradoxical Nature of NDDs

Neurodevelopmental disorders (NDDs) – also referred to as neurobehavioral disorders - are defined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) as a group of conditions that onset in the developmental period, inducing deficits that produce impairment of functioning.[45] The two primary categories that comprise the neurodevelopmental disorder category in the DSM-5 include autism spectrum disorder (ASD) and attention-deficit/hyperactivity disorder (ADHD).[46] Both ADHD and ASD impact executive brain function, which alters an individual's emotions, behavior, self-control, learning and memory.[47]

The DSM-5 Manual defines ASD by "persistent difficulties with social communication and social interaction" and "restricted and repetitive patterns of behaviors, activities or interests" to the extent that these limit and impair everyday functioning.[48] ADHD is defined by "impairing levels

[45] See *supra* note 6.
[46] *Id.*
[47] Francesco Craig, et al, *A review of executive function deficits in autism spectrum disorder and attention-deficit/hyperactivity disorder*, NEUROPSYCHIATR DIS TREAT. (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4869784/
[48] Diagnostic And Statistical Manual of Mental Disorders. 5th Ed. Arlington, VA: AMERICAN PSYCH. ASSOCIATION, (2013). https://www.cdc.gov/ncbddd/autism/hcp-dsm.html

of inattention, disorganization, and/or hyperactivity-impulsivity." [49] ADHD is considered a chronic and debilitating disorder [50] and like ASD can result in poor social functioning.[51]

Ironically, the DSM-4 (predecessor to the DSM-5) prohibited the diagnosis of ADHD for persons diagnosed with ASD and visa-versa.[52] Now, the DSM-5 not only allows dual diagnosis, but 50 to 70% of individuals with ASD also present with comorbid ADHD.[53] Presently, there is no scientific explanation regarding the comorbidity rate of ASD and ADHD.[54] Likewise, while there is growing evidence that several genes have been linked to the disorders, no specific gene or gene combination has been identified as their cause.[55] There is also no formal medical test, like blood work, to make a diagnosis, and the severity of the condition cannot be assessed via currently available brain imaging such as MRI or PET scans.[56] The only currently accepted means to make a diagnosis is behavioral observation by an expert based on the standards provided in the DSM-5.[57]

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[49] National Institute of Mental Health, *Attention-Deficit/Hyperactivity Disorder*. NATIONAL INSTITUTE OF MENTAL HEALTH (last visited Nov. 15, 2023), https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd

[50] AMERICAN PHYSCHIATRIC ASSOCIATION. *What is ADHD?* (last revised Jun. 01, 2022), https://www.psychiatry.org/patients-families/adhd/what-is-adhd

[51] *Id*.

[52] Hedi E. Ramos-Zimmerman, *The Need to Revisit Legal Education in an Era of Increased Diagnoses of Attention-Deficit/Hyperactivity And Autism Spectrum Disorders*, 123 Dick. L. Rev. 113 (2018).

[53] Camille Hours, et al, ASD and ADHD Comorbidity: What Are We Talking About? Front Psychiatry [Internet] (Feb. 28, 2022) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8918663/

[54] *Id*.

[55] Cleveland Clinic, *Attention-Deficit/Hyperactivity Disorder (ADHD)*. (Feb. 22, 2023) ClevelandClinic.com, https://my.clevelandclinic.org/health/diseases/4784-attention-deficithyperactivity-disorder-adhd

[56] *Id*.

[57] *Id*.

Significantly, neither ASD nor ADHD are per se diagnostically classified as a "learning disability" which is distinguished by academic skills that are well below the average in reading, writing, or mathematics.[58] Furthermore, neither ASD nor ADHD are diagnostically classified as an "intellectual disability" which is determined by reduced intellectual capabilities.[59] Modern research suggests that despite the level of impairment inherent in these conditions, individuals with NDDs are frequently cognitively gifted in other certain areas. Almost 60% of individuals with ASD have an above-average IQ [60] and neuroscience links ADHD with creativity and ability to overcome knowledge constraints.[61] Even individuals with dyslexia, which is an NDD that *is also* medically recognized as a learning disability, are far more likely to have above-average reasoning.[62] Taken together, NDDs are riddled with mystery, a wide array of symptoms, ambiguity of diagnosis, and paradox.

2. The Unintended Consequences of the Neurodiversity Movement

Neurodiversity is the idea that differences in thinking, learning, and behaving are *differences* and *not deficits*.[63] The aim of the neurodiversity movement is to promote the equality and inclusion

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[58] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, And Medicine. Mental Disorders And Disabilities Among Low-Income Children. THE NATIONAL ACADEMIES PRESS. (2015) at 10. https://doi.org/10.17226/21780.

[59] Autism.org, Average or high IQ in individuals with ASD may be higher than previously estimated, AUTISM.ORG (Dec. 1, 2021), https://autism.org/average-or-high-iq-in-individuals-with-asd-may-be-higher-than-previously-estimated/#:~:text=The%20researchers%20found%20that%20of,average%20or%20higher%20IQ%20score.

[60] *Id*.

[61] Holly White, *The Creativity of ADHD*, SCIENTIFICAMERICAN.COM (Mar. 5, 2019), https://www.scientificamerican.com/article/the-creativity-of-adhd/

[62] Chris Cole, *Strengths of Dyslexia*, DYSLEXIASUPPORTSOUTH.ORG (2019), https://www.dyslexiasupportsouth.org.nz/parent-toolkit/emotional-impact/strengths-of-dyslexia/#:~:text=(84%25%20of%20dyslexics%20are%20above,predict%20future%20events%3B%20make%20decisions.

[63] Nicole Baumer, et al, What is *Neurodiversity,* HARVARD HEALTH PUBLISHING (Nov. 23, 2021), https://www.health.harvard.edu/blog/what-is-neurodiversity-202111232645

of "neurological minorities."[64] While neurodivergence is not a medical term, it is usually used in the context of NDDs.[65] Some advocates of neurodiversity believe that a substantial amount of suffering experienced by people with NDDs is a result of the barriers imposed by social norms, which cause social exclusion and inequity, as opposed to the differences themselves.[66] In some regards this claim is backed by research. For instance, the 13-year reduction in life expectancy associated with ADHD is not necessarily caused by the condition itself, but because of the struggles of trying to achieve a healthy balanced lifestyle while dealing with the psychological distress and social maladjustment inherent in the disorder.[67]

While the neurodiversity movement is spreading a positive message and helping overcome social stigma, the idea that NDDs are differences and not deficits may unintentionally hinder employee-plaintiffs' ability to receive protection under the ADA. After all, the ADA protects qualified employees with *disabilities* and does not protect employees who are merely different.

II. ANALYZING ADHD & ASD WORKPLACE DISCRIMINATION CLAIMS

Despite decades of advocacy and several legislative efforts to broaden protection to individuals with disabilities, passing the threshold ADA requirements can still be troubling for many employees with NDDs. In addition to the challenges faced in overcoming the threshold requirements, employees new to the workforce are susceptible to experience a very challenging transition from an academic setting to a workplace setting.

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] See *supra* note 8.

A. Hurdle #1: Demonstrating an "Actual Disability" to a "Major Life Activity"

Prior to the Amendments, courts were split whether ADHD could even constitute a disability under the ADA.[68] Now most courts acknowledge that ADHD *may* constitute an "actual disability," but some courts remain skeptical if ADHD is "substantially limiting" enough to warrant protection under current law. It is unclear what an employee alleging workplace discrimination must show to convince a court that ADHD is an "actual disability," and this is problematic.

1. Pre-ADAAA

Prior to the Amendments it was unlikely for people with ADHD to receive protection under the ADA because the original Act did not define "substantially limits" or "major life activity."[69] Absent a definition, the Supreme Court defined "substantial limitation" to mean one that "prevents or severely restricts a major life activity."[70] The Court also construed a "major life activity" to include only activities of "central importance to most people's daily lives."[71] Furthermore, the Court held that when considering if a person was substantially limited, the extent of impairment must be analyzed after accounting for corrective measures such as medication [72] which pertained to many people with ADHD because during the 1990's medications used to treat ADHD increased fourfold.[73]

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[68] Christine M. Fuller, *Expanding Protection For Attention Deficit Hyperactivity Disorder Individuals Under The Americans With Disabilities Act*, 17 LOY. J. PUB. INT. L 61, 94 (2015).
[69] STEPHEN F. BEFORT, *supra* note 30.
[70] STEPHEN F. BEFORT, *supra* note 10 at 19.
[71] *Id*.
[72] *See supra* note 33-34.
[73] Daniel F. Connor, *Problems of Overdiagnosis and Overprescribing in ADHD*, PSYCHIATRIC TIMES VOL 28 NO 8 (2011), https://www.psychiatrictimes.com/view/problems-overdiagnosis-and-overprescribing-adhd

Knapp v. City of Columbus illustrates how employees with ADHD struggled to persuade courts that their condition was "substantially limiting" enough to constitute an "actual disability."[74] That case involved three firefighters with ADHD – Gary Knapp, Brian Willison, and William Fitzpatrick – who each separately requested testing accommodations that were denied by their employer.[75]

Without testing accommodations for a promotional exam Knapp failed the exam and was unable to be promoted.[76] Similarly, Willison applied for testing accommodations for a promotional examination for position as fire lieutenant, which was denied, causing him to receive an inadequate score to qualify for the position.[77] Lastly, Fitzpatrick who had received testing accommodations on an examination he took to be promoted fire lieutenant, was denied accommodations to elevate his status to that of fire captain[78]. Consequently, he failed the exam and could not become captain.[79]

The district court concluded that none of the firefighters were eligible for ADA protection because they were not disabled. The court was not persuaded that Knapp had a "substantial limitation" to the major life activity of learning because while he graduated high school at the bottom of his class, he earned better grades while enrolled in community college, did not have impaired intellect, and testified that medication helped mitigate his ADHD symptoms.[80] The court

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[74] *Knapp v. City of Columbus*, Nos. C2-CV-01-255, C2-CV-02-1221, C2-CV-04-203, 2005 U.S. Dist. LEXIS 42897 (S.D. Ohio Feb. 16, 2005)
[75] *Id*. at 1.
[76] *Id*. at 3.
[77] *Id*. at 3-4.
[78] *Id*. at 4.
[79] *Id*.
[80] *Id*. at 33-37.

reached the same conclusion with respect to Willison[81] and also Fitzpatrick, who graduated from high school at the top of his class.[82]

On appeal,[83] the Sixth Circuit Court of Appeals pointed to the fact that each firefighter took ameliorating medication which they admitted helped mitigate the symptoms of their conditions.[84] Relying on Supreme Court precedent, the Sixth Circuit Court of Appeals explained that ADA coverage is limited to those people whose impairments are not mitigated by corrective measures. Thus, the Court upheld the decision.

In *Knapp*, each firefighter had a medical diagnosis of ADHD and supported their claim by personal testimony and supportive evidence of impairment such as receiving poor grades in the past. However, neither court was convinced that ADHD was sufficiently impairing to warrant ADA protection. The fact each firefighter took medications only served as a "nail in the coffin" on appeal. Importantly, the entire focus of the case was on whether the firefighters were "substantially limited" and the court did not address why the employer refused accommodations in the first place. Because the Sixth Circuit held that the employees did not have an actual disability, the firefighters were left with no recourse after being denied accommodations, and consequently a promotion. This outcome signals to employers that they can refuse to accommodate employees with ADHD without legal repercussions.

On their face, the changes brought by the Amendments seem like they would remedy the issues presented in *Knapp*. Several major life activities, not previously recognized, are very relevant to

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[81] *Id*. at 39.
[82] *Id*. at 45.
[83] *Knapp v. City of Columbus*, 192 F. App'x 323 (6th Cir. 2006)
[84] *Knapp*, 192 F. App'x. at 329. (Knapp said medication made a "night and day" difference, Willison admitted the medication allowed him to fulfill his familial and employment responsibilities. Fitzpatrick took medications on an as-need basis).

ADHD such as reading, concentrating, thinking, and communicating.[85] The Amendments also instruct courts to provide protection "to the maximum extent permitted."[86] The EEOC explicitly provides that "substantially limits" should also be construed broadly in favor of coverage to the maximum extent, that it should not be a demanding standard, and that the primary object of attention in cases should be on whether employers complied with their obligations under the ADA or engaged in discrimination.[87] Taken together, it is reasonable to suspect all plaintiffs in *Knapp* would have a more favorable outcome, at least to survive a summary judgment motion.

Unfortunately, many employees with ADHD meet the same issues and fate as the firefighters in *Knapp*. This is immensely consequential because if an employee cannot prove that they are legally disabled, they are generally not entitled to *any* accommodations or protections afforded by the ADA.

2. Post-ADAAA Cases

Presently, most courts require more than an ADHD diagnosis accompanied by allegations of impairment to establish disability status. The following three cases demonstrate how it remains unclear what evidence is satisfactory to establish a "substantial limitation" to a major life activity.

For example, in *Weaving v. City of Hillsboro* a police officer alleged that he had been fired for symptoms of his ADHD.[88] The district court concluded that the officer *was* disabled under the ADA and that he was wrongfully terminated because of his disability.[89] Therefore, a jury awarded

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[85] See *supra* note 34.
[86] U.S.C. § 12102(4)(A).
[87] C.F.R. § 1630.2(j)(1)(i)-(iii).
[88] *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014).
[89] 763 F.3d 1107.

him six figure damages.[90] The City appealed the decision.[91] On appeal, the Ninth Circuit Court of Appeals reversed the district court's judgment, stripped the officer of ADA protection, and concluded that he was not disabled.[92]

In that case, during the hiring process, the officer disclosed that he had "intermittent interpersonal communication issues" and a history of ADHD dating to his childhood.[93] He was hired contingent upon passing a psychological evaluation which deemed him fit for duty.[94] The officer's first-year evaluation praised his experience and knowledge but noted that "[a] few members of the Department have the misconception that [the officer] is arrogant."[95] Following the evaluation he applied for a promotion to sergeant which required a "psychological leadership assessment" conducted by an off-site psychologist.[96] The psychologist provided a six-page report in which he described the officer as having the profile similar to individuals who "tend to be dominant in interpersonal relationships"[97] but was otherwise "posed in his presentation" and "would present well in any type of situation."[98] Based on his positive work performance the officer was promoted to sergeant.[99]

His termination precipitated from an event in which he verbally rebuked a subordinate officer over the radio and issued him a lengthy disciplinary letter.[100] The subordinate officer felt

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[90] *Id*.
[91] *Id*.
[92] 763 F.3d 1107.
[93] 763 F.3d at 1108.
[94] *Id*. at 5.
[95] *Id*. at 6.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 7.
[99] *Id*.
[100] 763 F.3d at 1109-10.

the response was inappropriate and filed a complaint with HR.[101] Pursuant to standard practice, the officer was put on paid administrative leave pending an investigation of the grievance.[102]

On leave the officer sent a letter to his employer explaining that he had met with his psychiatrist who determined that his interpersonal difficulties were due to his ADHD.[103] Shortly after the letter was sent he was terminated.[104] At trial the officer's psychiatrist testified that due to his ADHD, the officer had a hard time understanding the emotions of others, an inability to regulate his emotions in response to others, and the inability to empathize with others.[105] However, the psychiatrist also testified that the officer could be an excellent officer.[106]

On appeal, the Ninth Circuit concluded that the officer was not disabled because he was not substantially limited in his ability to work or interact with others. The Court acknowledged that both were recognized as "major life activities."[107] However, the Court concluded that the officer was not substantially limited in his ability to work because the officer was "in many respects a skilled police officer," who was selected to high-level assignments due to his knowledge and technical competence, and because he passed psychological evaluations that deemed him fit for duty as a police officer.[108] The Court also noted that the officer "developed compensatory mechanisms that helped him overcome ADHD."[109]

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101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 12.
105 *Id.* at 10.
106 *Id.*
107 763 F.3d at 1109 at 18.
108 *Id.* at 17.
109 *Id.*

Furthermore, the court concluded that the officer was not substantially limited in interacting with others because “mere trouble getting along with coworkers” was not sufficient to demonstrate a substantial limitation. Rather, the court stated that the limitation needed to be severe, for example, “consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”[110] Therefore, the Court reversed the district court’s judgment and determined the officer did not suffer from a disability under the ADA.

In *Weaving*, the Court of Appeals exclusively analyzed whether the officer was “substantially limited” enough to receive ADA protection. The entire analysis focused on the extent of the officer’s impairment and entirely neglected to address whether his employer engaged in illegal discrimination or complied with ADA obligations. The nature of this analysis is antithetical to the explicit language and purpose of the ADA. The court imposed a demanding standard resembling the pre-ADAAA standard requiring an impairment “prevent or severely restrict” a major life activity, which the Amendments explicitly overruled. The court also pointed to “compensatory mechanisms” as evidence that the officer was not substantially limited, resembling the pre-ADAAA cases that considered ameliorative effects.

Similarly, in *Johnson v. Sedgwick County Sheriff's Dept.*, a detention deputy alleged that he was fired because of symptoms of his ADHD.[111] Specifically, the deputy was fired for falling asleep at work on multiple occasions.[112] The deputy claimed that his ADHD caused him to "become distracted, bored, and drowsy in the midst of boring, repetitive tasks."[113] According to

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[110] 763 F.3d at 1113 at 19. (quoting their decision in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Circ. 1999)
[111] *Johnson v. Sedgwick Cnty. Sheriff's Dep't*, 461 F. App'x 756 (10th Cir. 2012)
[112] *Johnson,* 461 F. App'x at 757.
[113] *Id*. at 2.

the district court, a report that diagnosed the employee with ADHD provided "no evidence" of a disability because it did not describe a substantial limitation to a major life activity.[114] Therefore, the court concluded that the detention deputy was not disabled.[115] Likewise, on appeal, the Tenth Circuit Court of Appeals determined that the deputy's diagnosis of ADHD, his testimony describing his impairment, and the pattern of falling asleep at work showed no evidence of a substantial limitation to *any* major life activity.[116] Therefore, they upheld the district court's decision.[117]

Like the court in *Weaving*, the Tenth Circuit Court of Appeals concentrated on the extent of the deputy's impairment and gave little attention to whether his employer engaged in illegal discrimination or complied with ADA obligations. The court quickly dismissed evidence showing that thirty other detention deputies had been disciplined for sleeping and none of them were fired.[118] The court simply stated, "but none had more than three reported incidents" and moved on.[119] While the plantiff in *Johnson* did not provide overwhelming evidence to support his claim, the court certainly did not interpret ADA coverage to the maximum extent permitted.

Lastly, in *Nadolski v. Assocs. in Sleep Med. Inc.*,[120] a Patient Care Coordinator alleged that his former employer violated the ADA by firing him because of his ADHD.[121] As a Patient Care Coordinator the plaintiff was required to log data into a database which he could do at his own

[114] *Johnson,* 461 F. App'x at 757.
[115] *Id*.
[116] *Johnson,* 461 F. App'x at 759.
[117] *Johnson,* 461 F. App'x at 756.
[118] *Id*.
[119] *Id*.
[120] *Nadolski v. Assocs. in Sleep Med., Inc.*, 160 F. Supp. 3d 1051 (N.D. Ill. 2016)
[121] *Nadolski,* 160 F. Supp. 3d 1052.

schedule prior to the assignment deadline.[122] The plantiff had good performance reviews aside from failing to submit timely reports.[123] He informed his employer that his ADHD made it difficult for him to get things done on time[124] and expressed on several occasions that he felt overwhelmed by certain aspects of the job.[125] Subsequently, he was fired. The employee alleged that his ADHD substantially limited his ability to think, concentrate, and work.[126] To support his claim he provided a written evaluation by a nurse, who he was referred to by his physician, which stated, "he is always fidgety" has "unusual difficulty staying focused [on] boring or repetitive tasks," that "it is hard for him to prioritize work and chores" and that "he is easily distracted by events around him such as noise or movement."[127]

The court concluded that no reasonable jury could conclude that he was "substantially limited" in his ability to think or concentrate[128] because outside of his employment as a Patient Care Coordinator he rehearsed and performed in plays.[129] According to the court, those were "complicated activities that require the ability to focus on particular tasks."[130] The court also concluded that he was not substantially limited in his ability to work because "to the extent that [his] impairment substantially limit[ed] his ability to perform repetitive record-keeping tasks, that impairment is only at issue by his own doing."[131]

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[122] 160 F. Supp. 3d 1052 at 3-4.
[123] *Id*.
[124] 160 F. Supp. 3d 1052 at 6.
[125] 160 F. Supp. 3d 1055 at 8.
[126] *Id*. at 10.
[127] 160 F. Supp. 3d 1056 at 11.
[128] *Id*. at 12.
[129] *Id*.
[130] 160 F. Supp. 3d 1056 at 14.
[131] *Id*. at 16.

In *Nadolski*, the court dismissed the validity of evidence proving the employee's impairment because it was written by a nurse and not by his physician herself. The court pointed to irrelevant facts and his ability to perform in plays to conclude that he was not impaired. More significantly, the court insinuated that aspects of the employee's impairment were of his own volition. In no way does this reflect the spirit of the ADA/ADAAA.

As illustrated in the previous cases, despite the ADA's Amendments explicit intent to offer broad coverage, many courts use the "substantial limitation" qualification to deny employees with ADHD ADA protection. In some instances, this issue derives from an inadequate amount of evidence. In other situations, courts point to the employee's success, either in work or irrelevant areas of life, to refute the extent of the impairment.

Courts should not be this critical when determining what constitutes an "actual disability" and far more deference should be given to the ADHD diagnosis itself. That is because the only way to diagnose ADHD is by an individualized assessment based on at least six persistent symptoms that are disruptive or inappropriate and present in two or more settings, such as home and work.[132] The diagnosis also requires clear evidence that the symptoms interfere with, or reduce the quality of, social, school, or work functioning.[133] Ultimately, what makes ADHD a diagnosable disorder is that normal human behaviors, like inattentiveness and impulsivity, exceed that of a person in the general population and rise to an extent that significantly impairs life activities.

When a judge thoroughly scrutinizes the behavior of an employee to determine that they are not substantially limited in a major life activity, the judge is effectively substituting their own

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[132] See *supra* note 34.
[133] *Id.*

opinion for that of the healthcare expert who made the diagnosis. Judges do not have the knowledge, clinical experience, or expertise to do this, and it is demonstrated in the previous cases.

For instance, the court in *Nadolski* discredited how "substantially limited" the employee was in his ability to concentrate based on an arbitrary belief that engaging in drama requires focus compared to a person in the general population. In addition to theatre being an arbitrary means to determine one's ability to focus, this comparison also illustrates how the nature of ADHD is poorly understood by judges. Individuals with ADHD are prone to experience "hyperfocus," a phenomenon that results in intense concentration and single-minded focus, often pertaining to activities they find very interesting. Therefore, to discredit the employees' claim that ADHD substantially limited his ability to focus by pointing to something of strong interest to him as evidence is very misleading and erroneous. There is a reason why the employee's evaluation written by a medical expert articulated that his ADHD caused difficulty staying focused on *boring or repetitive tasks*. Unlike a judge with an inadequate understanding of the condition, a healthcare expert would know that one's ability to focus on occasion does not mean that they are not substantially limited in their ability to concentrate. That is because ADHD impairs a person's ability to manage or regulate their level of attentiveness. Therefore, certain instances that demonstrate focus, even hyperfocus, do not negate the overall significance of impairment to one's ability to concentrate.

According to the EEOC, certain impairments due to their *inherent nature* are substantially limiting and therefore are virtually always disabilities.[134] As early as 2011, Autism was added to

[134] ADA Nat. Network, Individuals With Autism Spectrum Disorder and Employment: Application of the Americans With Disabilities Act (ADA) Title I Standards, (2020), https://adata.org/legal_brief/autism-spectrum-disorder-and-employment

this list, which likely explains why employees with ASD do not experience the same issue. Significantly, however, the EEOC classifies ASD as a condition that substantially limits the "major bodily function" of brain function.[135] That could be because the classification of ASD originated at a time when autism was characterized by substantially low intelligence and researchers were unaware that ASD existed on a spectrum.[136] As research disproved that theory, resulting in significant changes in the DSM, the classification of ASD legally (in the EEOC) has not changed. Therefore, judges continue to give deference to the diagnosis. Many cases, like the ones in this Article, do not allege that ADHD imposes a substantial limitation to brain activity. Unlike ASD, ADHD was never thought to impair intellect or was listed as a condition that almost always substantially limits brain activity. For that reason, alleging a significant impairment to a brain function may be met with the same level of judicial scrutiny. Because there is no way to "prove" ADHD aside from its behavioral manifestations, the same issue would arise.

The treatment of ASD and ADHD in this regard highlights the disconnect between "disability" as a legal fiction and "disability" as a medical diagnosis. Courts previously treated employees with Aspergers Disorder (sometimes called high-functioning autism) the same as those with ADHD.[137] That changed when the DSM retired it as an official diagnosis, regarding it as ASD, in 2013.

B. Hurdle #2: Demonstrating "Qualified" to Perform "Essential Functions"

Another hurdle for employees with NDDs to overcome in workplace discrimination claims is the second threshold requirement, demonstrating that they are "qualified" to perform the essential

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[135] *Id.*
[136] See *supra* note 34.
[137] See *e.g. Morse v. Midwest Indep. Transmission Sys. Operator, Inc.*, No. 13-CV-0150 (PJS/SER), 2013 U.S. Dist. LEXIS 54805 (D. Minn. Apr. 17, 2013) (concluding that an employee with Asperger's Disorder, which is now regarded as ASD, was not disabled because there was no evidence he was limited in a major life activity).

functions of the job. While the hallmark of ADHD and ASD is difficulty with social interaction, it is unclear how courts will adapt to a deal with a growing level of social differences in the general public. Many courts determine that social skills and communication are essential functions of the job, not merely incidental. Therefore, many employees with NDDs are not considered "qualified."

For example, in *Stebbins v. Reliable Heat & Air, LLC*[138] a customer service representative with ASD was fired for rudeness.[139] The employee alleged that his ASD made him oblivious to social ques which resulted in an outward manifestation of tactlessness.[140] The employee's job description was to receive service calls from customers, to schedule appointments, and to dispatch technicians to fix problems that customers complained about.[141] He requested that in the event that a customer felt offended, his employer could explain his disability to them.[142] The district court determined that customer satisfaction and repeat business is essential to the employer and that proper communication constituted an essential function of the employee's job.[143] Further, the court explained that the requested accommodation would not remedy the issue because "the customer is still offended first and the accommodation is simply damage control."[144] Therefore, the court held that the employee was not "qualified" to perform the essential functions of the job with or without reasonable accommodation. As a result, the employee was not afforded protection from workplace

[138] *Stebbins v. Reliable Heat & Air, LLC*, No. 10-3305-CV-S-RED, 2011 U.S. Dist. LEXIS 115928 (W.D. Mo. Oct. 7, 2011)
[139] *Id*. at 1.
[140] *Id*.
[141] *Id*. at 5,6.
[142] *Id*. at 8.
[143] *Id*. at 6.
[144] *Id*. at 8.

discrimination under the ADA.[145] The Eighth Circuit Court of Appeals affirmed the decision with no further analysis, just "for the reasons stated by the district court."[146]

Similarly, in *Jakubowski v. Christ Hosp.* a medical resident with ASD was fired for poor communication skills among colleagues.[147] Prior to being fired, he informed his employer that he had ASD and requested "knowledge and understanding" on behalf of his colleagues.[148] He alleged the communication issues would be resolved if his employer informed his colleagues about his condition and its symptoms.[149] The request was rejected and he was subsequently terminated. The court concluded that *no* reasonable accommodation would alleviate the issue without posing a risk of compromised patient care.[150] Therefore, the court held the resident was not qualified for the job, and not entitled to ADA protection.[151] The Sixth Circuit Court of Appeals upheld the decision.[152]

A similar issue arises regarding inadequate behavior associated with NDDs. For instance, the Second Circuit in *Krasner v. City of New York* concluded that a firefighter who was terminated for misconduct, including instances of subordination and profane language, was not qualified to perform the essential functions of the job.[153] On appeal, the Second Circuit Court of Appeals concluded that the fact the behavior may have resulted from the employee's ASD was "immaterial"

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[145] *Id*. at 9.
[146] *Stebbins v. Reliable Heat & Air, LLC*, 473 F. App'x 518 (8th Cir. 2012).
[147] *Jakubowski v. Christ Hosp.*, No. 1:08-CV-00141, 2009 U.S. Dist. LEXIS 66847 (S.D. Ohio Aug. 3, 2009).
[148] *Id*. at 6.
[149] *Id*.
[150] *Id*. at 21.
[151] *Id*.
[152] *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195 (6th Cir. 2010)
[153] See *Krasner v. City of New York*, 580 Fed.Appx. 1, 3 (2d Cir. 2014)

because workplace misconduct is a legitimate and nondiscriminatory reason for terminating employment.[154]

While it is logical that communication and behavior are vital for company culture and job performance, providing too much deference to employers entirely stunts progress in promoting neurodiversity in the workplace. Employers can broadly include "communication" and "professional behavior" in their job descriptions, which courts give deference to. In some instances, employees with NDDs have even been deemed not "qualified" for being too friendly. For example, in *Taylor v. Food World* the Eleventh Circuit held that an employee with ASD was not "qualified" because he was "loud, overly friendly, and overly talkative."[155]

When cases end in summary judgment, there is no incentive for employers to foster policies that are more accepting or accommodating of people with atypical social patterns aside from their own goodwill. There is also not much the employee can do to reduce their social quirks. After all, both ADHD and ASD are "incurable" conditions. Medications and therapy only help mask the symptoms. The only mechanism to facilitate change among resistant employers requires more leniency on behalf of courts when determining whether social or behavior impairments in NDD-related claims deem the employee unqualified. If courts are more lenient in this regard, more cases will go before a jury of peers, who might view atypical behavior in a different light.

Another issue pertaining to the determination as to whether an employee is "qualified" is the conflict between how courts interpret a "substantial limitation" versus how they determine if a person is "qualified". Congress overruled the narrow judicial interpretations regarding who is disabled because only people with severe disabilities were considered disabled, and then those

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[154] *Id.*
[155] See *Taylor v. Food World*, 133 F.3d 1419 (11th Cir. 1998).

same individuals could not meet the other criteria of the statute – that they were "qualified" for the job.[156] This served as a complete barrier for people with disabilities to receive ADA protection. Sadly, this issue persists for employees with NDDs despite the Amendment.

For example, consider the officer in *Weaving*. In that case, the court determined that he was not substantially limited in his ability to work because he was a skilled police officer, was promoted due to his knowledge and technical competence, and because he passed necessary psychological assessments. Now imagine that the officer was terminated because he was unskilled, unknowledgeable, and unable to pass required psychological assessments. A court would certainly determine that he was not qualified to perform the essential functions of the job. Similarly, if the officers' social mishaps became more prevalent and more substantially impacted his job performance, the officer would experience the same outcome as the plantiff in *Stebbins*.

When courts construe what constitutes a disability narrowly but also give deference to employers regarding the essential functions of the job, employees with NDDs are faced with a "catch-22" situation. They are either not substantially limited enough to have an "actual disability", or they are too disabled to be "qualified" to perform the essential functions of the job. In fact, the court in *Johnson v. Sedgwick County Sheriff's Dept*. acknowledged that "even assuming plaintiff's propensity for falling asleep at work was a symptom of a disability, as he contends, then the symptom rendered him unable to perform one of the essential functions."[157]

[156] See *supra* note 9 at 50.
[157] *Johnson v. Sedgwick Cnty. Sheriff's Dep't*, No. 08-2614-WEB, 2011 U.S. Dist. LEXIS 76444 (D. Kan. July 14, 2011) at 17.

III. CONCLUSION

It is time for employers to adopt policies that facilitate neurodiversity in the workplace. Fostering neurodiversity in the workplace will benefit everyone, not just those with neurodevelopmental disorders. Unfortunately, many employers feel it is not their responsibility to adapt their policies or workplace unless necessary to avoid legal repercussions.

While social and scientific acceptance of high-functioning neurodevelopmental and behavioral disorders has evolved, many workplaces and courts have not. To date, a significant barrier to progress in facilitating neurodiversity in the workplace is due to lawyers and judges misunderstanding of the nature of the conditions and misapplication of the ADAAA.

As demonstrated in Section III, Part A, many courts grant summary judgment in favor of employers, concluding that employees with NDDs are not substantially limited in a major life activity. This occurs despite plaintiffs tethering their claim to relevant and recognized major life activities such as the ability to think or concentrate. A prevalent issue is that courts discredit the extent of employee's impairments by strictly applying the comparative standard provided by the EEOC. In doing this, courts point to arbitrary accomplishments to determine the employee is not disabled. Lastly, many courts erroneously neglect to evaluate whether employers engaged in illegal discrimination or complied with ADA obligations. Altogether, courts restrict the scope of ADA protection and leave many employees with NDDs vulnerable to discrimination without redress. This resembles the same pre-ADAAA outcome that Congress sought to resolve.

Part B showed that employees with NDDs run into additional problems when trying to prove that they are "qualified" to perform the essential functions of the job. This issue derives from the fact that courts give great deference to employers when determining what constitutes an essential function, and most (if not all) employers have broad policies requiring a requisite level of social

skills and behavior. The manner that courts scrutinize a "substantial limitation" exacerbate this issue by establishing a "catch-22" situation where employees with NDDs are either not impaired enough to be considered disabled or are too impaired to be considered qualified. Once again, this resembles an outcome that many plaintiffs faced prior to the Amendments, and which Congress intended to prevent.

Without having the opportunity to establish the threshold requirements of the ADA, the ADA will continue to lack enforcement and will remain nothing more than an empty promise for employees with NDDs.